

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LVAUGHN CLARK II,

Defendant and Appellant.

D074320

(Super. Ct. Nos. SCD274723,  
SCD271875, SCD274099,  
SCE376028)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed in part; reversed in part, and remanded with directions.

Marilee Marshall for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Lvaughn Clark II guilty of two counts of first degree burglary (Pen. Code, §§ 459, 460, subd. (a), 667.5, subd. (c)(21);<sup>1</sup> counts 1, 6); one count of second degree burglary (Pen. Code, § 459; count 2); three counts of using personal identifying information of another (Pen. Code, § 530.5, subd. (a); counts 3, 4, 5); and one count of unlawful driving and taking of a vehicle (Veh. Code, § 10851, subd. (a); count 7). After the jury was excused, the trial court accepted Clark's admission that he suffered a serious felony and strike prior to his conviction (Pen. Code, §§ 667, subds. (a)(1), (b)-(i), 668, 1170.12, 1192.7, subd. (c)).

Clark was sentenced to eight years for count 1, a consecutive 16 months for each of counts 2 and 3, and a consecutive 32 months for count 6. The sentences for counts 4 and 5 were ordered stayed, and Clark was sentenced to time served for the misdemeanor count 7. The trial court also imposed a mandatory five-year sentence for Clark's serious prior felony conviction (§ 667, subd. (a)(1)), imposing a total sentence of 20 years.

On appeal, Clark contends that there was insufficient evidence to convict him of burglary because the prosecution failed to meet its burden of proving that he entered the hotel rooms where the burglaries took place, or that he aided and abetted someone else who entered the hotel rooms. Clark also contends that remand is required to allow the trial court to exercise its discretion to strike the five-year term imposed for his prior serious felony under section 667, subdivision (a)(1).

---

<sup>1</sup> All further undesignated statutory references are to the Penal Code unless otherwise noted.

We affirm and reverse the judgment in part. We vacate Clark's sentence and remand the matter to permit Clark the opportunity to request dismissal of the serious felony prior conviction, and affirm the judgment in all other respects.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

During the early morning hours of two consecutive days, Clark and his female accomplice, Stephanie Reece, entered two hotel rooms at the Hilton San Diego (Mission Valley) while the victims were sleeping and stole their purses, wallets, identification cards, keys, and cell phones, as well as other personal items. Clark and Reece used the keys to steal more personal items from the victims' cars, drove to the nearby Walmart retail store to sell one of the victim's cell phones at an ecoATM machine for cash, and used another victim's credit card to purchase jewelry and other miscellaneous items from the Walmart. Law enforcement caught Clark the next day driving a stolen car that contained numerous items stolen from the victims' hotel rooms and cars. Clark's defense at trial was that, although he was on the hotel property during the general time frame of the burglaries, he did not enter the hotel rooms or aid and abet someone else to enter the hotel rooms, and was therefore guilty only of receiving stolen property. The jury heard testimony from the victims, the room director for the Hilton hotel, the loss prevention officer for the Walmart retail store, and law enforcement at trial.

### I. *The November 11th Burglary*

Samantha M. and her fiancée Kyle M., a sergeant in the Marine Corps, spent the night at the Hilton hotel to attend a Marine Corps Ball from the evening of November 10, 2017, to the morning of November 11, 2017. The couple drove to the hotel in Kyle's

2015 Nissan Rogue earlier that evening. Samantha and Kyle left their room sometime after 6:00 p.m. when the ball started, went back to change clothes, and then left again for about an hour to an hour and a half, but were back in their room by midnight.

At around midnight, the couple left their room again for about 15 minutes to get Patrick R. Patrick, a subordinate of Kyle who also attended the ball, was locked out of his hotel room and could not get back inside after getting into an argument with his wife. The three of them went back to Samantha and Kyle's room and were asleep by 12:30 a.m. Patrick's wallet was on the nightstand next to where he slept. Samantha's cell phone was on the bedside table while Kyle's keys and wallet, and Samantha's identification cards and lipstick, were all in a pile on the dresser next to the television. Kyle's locked car was parked in the garage.

At around 5:00 a.m., Samantha woke up for about 10 to 15 minutes to go to the bathroom, sat on the bed and drank some water, and checked her cell phone for a text message from her sister. She then placed her cell phone back on the bedside table and went back to sleep. Kyle and Patrick were still sleeping at the time. At around 5:15 a.m., Samantha woke up again when she heard some rustling in the hotel room. She did not get up or open her eyes because she thought it was Patrick. She later discovered that several personal items had been stolen from the hotel room and Kyle's car.

Meanwhile, a surveillance video showed that at around 5:10 a.m., Clark and Reece entered the elevator to the hotel from the parking garage. At around 5:44 a.m., they exited the elevator from the hotel and walked back to the parking garage. Another surveillance video showed them sitting in the Walmart parking lot located approximately

10 to 20 minutes away from the Hilton hotel at around 6:38 a.m.<sup>2</sup> At around 7:10 a.m., they entered the Walmart retail store and purchased some items at the self-checkout using Patrick's stolen credit card. They briefly exited the store to place the items in their car. At around 7:14 a.m., they reentered the Walmart store and sold Samantha's stolen cell phone at an ecoATM machine located inside of the store. At 7:51 a.m., they purchased jewelry using Patrick's stolen credit card. By 7:59 a.m., they had exited the Walmart store.

Back at the hotel between 7:15 and 7:30 a.m., Samantha woke up again and reached for her cell phone, which was missing. Kyle was still in the room, but Patrick had left a few minutes earlier to make a phone call and have breakfast with another Marine. After looking around the room, she decided to use a phone tracker on Kyle's phone to locate her cell phone, and saw that it was at the nearby Walmart that Clark and Reece had just left.

When Patrick returned to Samantha and Kyle's room, they told him that their personal property had been stolen. Patrick then helped them look around the room and noticed that his wallet was missing. Patrick's wallet contained three credit cards, a debit card, driver's license, and other miscellaneous cards. Patrick immediately went online

---

<sup>2</sup> The room director for the Hilton hotel testified that the time stamp on their surveillance cameras was 19 minutes faster than actual time, and the loss prevention officer for Walmart retail store testified that the time stamps on their surveillance cameras could be accurate, or could be off by five to 20 minutes. For ease of reference, the court cites to the time stamps that appear in respondent's brief so that the facts presented match the actual time when the incidents occurred, in accordance with these two witnesses' testimony.

and saw that two Walmart transactions were charged to one of his credit cards in the amounts of \$82.67 and over \$1,200. A charge of \$1,200 was also attempted on one of Kyle's credit cards.

Samantha, Kyle, and Patrick called law enforcement, who came to the hotel to take a report. Officer Allen Baylor, a 19-year veteran patrol officer of the San Diego Police Department, was assigned on patrol and was dispatched to the Hilton hotel at around 12:30 p.m. that afternoon. He met with the three of them to investigate the burglary, and noted that he did not see any signs of forced entry into the hotel room.

Samantha and Kyle did not yet know that their car had been broken into because the garage was dark, and they could not tell if items were missing from their car. They got a ride back to their apartment to get an extra key so that they could get into their car. After opening the car, they immediately noticed that several items were missing. Samantha's purse and wallet, both pairs of their sunglasses, a sunshade, and some clothing were stolen from the car. Several items were also stolen from Kyle's trunk, including his longboard skateboard and other items that were stored in a compartment inside of the floor of the trunk. Samantha and Kyle went to the Walmart later that afternoon and retrieved her cell phone from an ecoATM machine for old electronics with the assistance of a police officer.

At trial, Samantha identified all of the stolen property depicted in the pictures that she had provided to law enforcement during their investigation. Other than Samantha's cell phone, none of the items that were stolen from their hotel room were recovered. Several items stolen from their car, including their roadside emergency kit, medical

packet, tool kit, and sun shade; her bag and gift cards; and Kyle's flannel shirts, skateboard, and jacket were recovered and returned to them by law enforcement.

## II. *The November 12th Burglary*

Nathan B. was at the Hilton hotel the evening of November 12, 2017, for a weekend getaway with his girlfriend, Ashley F. Nathan was also a Marine, but was not associated with the Marine Corps Ball that was taking place that weekend. The couple went to bed at about 10:00 or 11:00 p.m. Nathan's wallet and keys were on the nightstand next to the bed, Ashley's cell phone was plugged in on the floor, and her purse was sitting on the bench at the end of the bed.

At around 3:00 a.m., Ashley woke Nathan up and said that she thought someone had just been in their room. She heard rustling and whispering in the room and saw someone standing at the end of their bed. Although the room was dark, some lighting came through the open hotel door. The lighting allowed her to see that the person was wearing a dark colored sweatshirt. She described the person as being tall with a medium build, and "almost positive[ly]" a male. Once the person realized that she was awake, he looked over at her and ran out of the door.

Nathan eventually got out of bed and noticed that the door was open. He peeked his head out of the door but did not see anyone there. After returning to the room and closing the door, he noticed that several personal items were missing from the nightstand, including his cell phone, car keys, and wallet, which contained his driver's license, credit cards, and debit cards. Ashley also got out of bed, walked over to where

the person had been standing, and immediately noticed that her purse, a few rings, and her cell phone had been stolen.

Nathan then went downstairs and called the police. He was accompanied by a security guard to check on his car, a 2010 Cadillac STS, and saw that it was still parked in the underground parking garage. He asked the security guard to keep an eye on the car because the keys had been stolen.

The police arrived about 20 minutes later. Officer Brian Moore, a 19-year veteran of the San Diego Police Department, responded to the Hilton hotel at around 3:30 a.m. that morning to investigate the burglary. He met Ashley and Nathan in the lobby and then went up to the hotel room together with them. He did not see any signs of forced entry into the hotel room, but noticed that the door did not close all the way and could easily be pushed open if the dead bolt was not locked.

Meanwhile, a surveillance video showed that at around 4:11 a.m., Clark and Reece exited the elevator from the hotel to the parking garage carrying several stolen items, including Kyle's skateboard. A few minutes later, they drove Nathan's car out of the parking garage, exiting through the entrance to avoid paying the fee. At around 6:00 a.m., Nathan was notified by security that his car was missing.

At trial, Nathan identified his car in the Hilton surveillance video clips that were played for the jury. He also identified a picture of his driver's license that was stolen from the hotel room. Ashley identified photographs of the driver's license, credit cards, gift cards, purse, wallet, and sunglasses that were stolen from the hotel room. Nathan's car and driver's license were returned a couple of months after the burglary, but his cell



phone, wallet, debit cards, keys, and other personal belongings were never recovered by law enforcement. Ashley's purse, wallet, and a pair of sunglasses were also recovered by law enforcement several months later.

### III. *The November 13th Pursuit and Arrest*

Officer Kyle Voss, a patrol officer with the California Highway Patrol, was on duty during the early morning hours of November 13, 2017, when he overheard a routine patrol call from the San Diego Police Department regarding an active pursuit heading toward his area at around 1:27 a.m. The police officers had initiated two spike strips in an attempt to stop Clark from fleeing from them in a stolen car. The first spike strip failed and Clark continued fleeing from the police officers. The second was successful in spiking the right front wheel of the four-door sedan. About seven miles into the pursuit, highway patrol took over by activating their patrol vehicle's lights and sirens. Officer Voss then conducted a pursuit intervention technique known as a "pit maneuver." He positioned his patrol vehicle to the left rear side of Clark's car and directed his patrol vehicle to the right, causing Clark to lose control of his car. Clark regained control and continued driving. Officer Voss then maneuvered his patrol vehicle to the right rear side of Clark's car, causing Clark's car to rotate clockwise. Approximately three to four miles into the pursuit, Officer Voss successfully stopped Clark's car, exited his patrol vehicle, and gave Clark and Reece orders to get out of the car. Clark was subsequently arrested.

At trial, Officer Voss identified Clark as the person who was driving the stolen car.<sup>3</sup> Reece was seated in the passenger seat. The car was cluttered, and Officer Voss recalled seeing Ashley's identification and Kyle's skateboard among the items in the car. He also saw a Maine driver's license with the name Erin. A receipt from one of Clark's Walmart transactions was also found in the car. All of the items were left in the car while it was impounded to another location.

#### IV. *The Investigation*

Detective Natalie Hone, an 11-year veteran of the San Diego Police Department, conducted the follow-up investigation of the burglaries. She met with and obtained video stills from Nicole T., the Director of Rooms for the Hilton hotel, and recorded a video from the screen of the security videos using the police department's digital camera. At trial, she identified the six video files numbered as MVI\_0001–MVI\_0006, which included video surveillance of the cars and the male and female suspect involved in the burglaries at the Hilton hotel.

Detective Hone also met with Mina L., the loss prevention officer from Walmart, and testified that, depending on traffic, it takes between 10 to 20 minutes to drive from the Hilton hotel to the Walmart retail store. Mina provided the detective with receipts

---

<sup>3</sup> The parties stipulated that Clark illegally possessed and drove the white 2012 Toyota Scion that was captured on the Walmart surveillance videos the morning of November 11, 2017, bearing the time stamps of 6:38:03 a.m., 6:38:55 a.m., and 8:04:06 a.m., which was the same car he used to flee from the officers the morning of November 13, 2017.

and still photos of the security videos that corresponded with the transactions made by Clark with the victim's credit card and at the ecoATM machine.

At trial, Detective Hone testified that Clark and Reece appeared together in the videos and video stills that she received from both the Hilton hotel and Walmart. She also identified a copy of the picture from Clark's driver's license that she pulled from a law enforcement database and matched it with the driver's license number that was entered in the ecoATM machine where Samantha's cell phone was sold. After identifying several of Clark's distinguishing features (such as his face, eyes, eyebrows, ears, haircut and style, and a tattoo below his left hairline), Detective Hone identified Clark in court as the person who appeared in the driver's license photo.

Detective Hone also testified as follows regarding the Walmart surveillance videos:

"... Based on the video, I was able to tell when they drove into the parking lot and parked. They stayed in the car for a while and they exited the vehicle together and went inside the store. They, in the store, they did two different transactions. But between those transactions, they actually went out to the car, drop[ped] some of the purchases off, [and] came back in[to] the store together. I was able to see them at the ECO ATM together, I watched them do the transaction that I saw in the ECO ATM stills. I ever [sic] watched them at self-checkout counter do that transaction with the two different cards.

"When they—they were helped in one of the transactions by an associate, and you could tell that the female with the [male], they were looking at some sort of jewelry, you know, holding hands. At one point I think they kissed. They were leaning up against each other and I was able to watch them leave the store and go back out to the car. He got in the driver's seat and she got in the passenger's side, and I watched them actually pull out of the parking spot so they had been backed in the spot and leave out of the frame."

A few weeks later, Detective Hone was informed of Clark's November 13, 2017 arrest. She processed, photographed, and conducted an inventory of the property found inside of the stolen Toyota Scion. The inventory included a receipt and jewelry box from transactions that Clark made at Walmart; the skateboard belonging to Kyle; and driver's licenses, credit cards, and other personal items belonging to the victims. Detective Hone also noticed that the same red backpack that was carried by the female suspect in the Hilton and Walmart surveillance videos was in the car, as well as a keycard and room key envelope belonging to the Hilton hotel.

## DISCUSSION

Clark contends that there was insufficient evidence to convict him of burglary because the prosecution failed to meet its burden of proving that he entered the hotel rooms, or that he aided and abetted someone else who entered the hotel rooms, with the intent to commit a theft or a felony. We reject this contention and find that there was sufficient evidence to support the first degree burglary convictions.

### I. *Standard of Review*

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings,

reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

## II. *Analysis*

Clark emphasizes that no direct evidence connected him to the burglaries for which he was convicted, and that the prosecution instead relied on circumstantial evidence. He contends that because the circumstantial evidence is not irreconcilable with innocence, it was insufficient to sustain his first degree burglary convictions. He essentially argues that because the circumstantial evidence supported two reasonable conclusions, one pointing to guilt and the other to innocence, the jury could not have found that guilt was the only reasonable conclusion, and therefore was obligated to find him not guilty of first degree burglary.

Clark's argument conflates the jury's role as a trier of fact with the deferential standard of review on appeal, and does not warrant reversal of Clark's conviction. "The appellate standard of review . . . provides a different role for the appellate court than that accorded to the jury. "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" [Citation.] "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court, that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]" [Citation.] Where the circumstances reasonably justify the trier of

fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal.' " (*People v. Clark* (2016) 63 Cal.4th 522, 625-626.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.] [¶] The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

#### A. *First Degree Burglary*

The elements of first degree burglary in California are: (1) entry into a structure being used for dwelling purposes; and (2) with the intent to commit theft or any felony. (§§ 459, 460; *People v. Anderson* (2009) 47 Cal.4th 92, 101.) Here, there is substantial evidence that Clark entered two occupied hotel rooms with the intent to steal the occupants' personal property.

First, it was reasonable for the jury to conclude that Clark entered Samantha and Kyle's hotel room on November 11, 2017, based on the tight timeline established by the witnesses' testimony and the surveillance videos. At 5:00 a.m., Samantha woke up to drink water, use the bathroom, and check her cell phone. At around 5:10 a.m., video surveillance showed Clark and Reece entering the hotel elevator from the parking garage. A few minutes later, the video surveillance showed Clark and Reece entering the main lobby and walking over to the elevators that have access to the higher hotel room floors. At 5:15 a.m., Samantha heard rustling in the hotel room. About a half an hour later at

around 5:44 a.m., video surveillance showed Clark and Reece exiting the hotel elevator and walking back to the parking garage.

At around 6:38 a.m., video surveillance showed Clark and Reece arriving in a stolen car at the Walmart retail store parking lot which was located about 10 to 20 minutes away from the hotel. Shortly thereafter, Clark made (and attempted to make) several recorded transactions at the Walmart by selling Samantha's stolen cell phone to an ecoATM machine at around 7:14 a.m., and using Patrick's and Kyle's credit cards at the self-checkout lane and jewelry section at around 7:09 a.m. and 7:51 a.m., respectively.

Back at the hotel, Samantha woke up again between 7:15 a.m. and 7:30 a.m. and discovered that the cell phone that she had checked before she fell asleep between 5:00 and 5:15 a.m. was no longer on the nightstand. Samantha, Kyle, and Patrick then noticed that several of their personal items were stolen from the hotel room. Samantha traced the location of her cell phone to the same Walmart retail store where Clark and Reece were present, and recovered it with the assistance of a police officer several hours later. Patrick also logged into his credit card account and saw that it was used to conduct two separate transactions at the same Walmart. Based on this evidence, it was reasonable for the jury to infer that Clark entered Samantha and Kyle's hotel room during the early morning hours of November 11, 2017, with the intent to steal their personal items. It was also reasonable for the jury to infer that Clark stole the items out of Kyle's car using the keys that he had just stolen from the hotel room.

Second, it was reasonable for the jury to conclude that Clark entered Ashley and Nathan's hotel room on November 12, 2017, based on the tight timeline established by

the witnesses' testimony and the surveillance videos. At around 3:00 a.m. that morning, Ashley woke up to the sound of rustling and whispering in her hotel room, and saw a male figure standing at the end of the bed wearing a dark sweatshirt. She and her boyfriend Nathan almost immediately got out of bed and discovered that several personal items were missing from their hotel room. They were later informed at around 6:00 a.m. that Nathan's car had also been stolen from the hotel's parking garage.

At around 4:15 a.m., the surveillance video showed Clark and Reece carrying several stolen items while walking into the hotel's parking garage. The surveillance video also showed Reece carrying the skateboard that was taken from Kyle's car the night before. The surveillance video then showed Nathan's Cadillac STS being driven out of the entrance lane of the parking garage about three minutes later. Based on this evidence, it was reasonable for the jury to infer that Clark entered Nathan and Ashley's hotel room during the early morning hours of November 12, 2017, with the intent to steal their personal items. It was also reasonable for the jury to infer that Clark stole Nathan's car using the keys that he had just stolen from the hotel room.

#### *B. Aiding and Abetting*

Even if Clark did not enter the hotel rooms himself, there is substantial evidence that he, at minimum, aided and abetted someone else to commit the burglaries. " 'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' " (*People v. Campbell* (1994) 25



Cal.App.4th 402, 409, quoting *People v. Cooper* (1991) 53 Cal.3d 1158, 1164; *People v. Atkins* (2001) 25 Cal.4th 76, 93.) "The [trier of fact] must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .'" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) "Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime, although these are factors the jury may consider in assessing a defendant's criminal responsibility." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529, citing *People v. Durham* (1969) 70 Cal.2d 171, 181.) However, "[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.'" (*Campbell*, at p. 409.) "Whether a defendant aided and abetted a crime is a question of fact. Consequently, on appeal, all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment." (*People v. Glenos* (1992) 7 Cal.App.4th 1201, 1208.)

Here, the evidence demonstrates more than Clark's mere presence at the crime scene. His considerable interactions with Reece, and his conduct immediately after the burglaries took place provided substantial evidence for the jury to reasonably conclude that he was present at the hotel for the purpose of assisting in the commission of the burglaries. On November 11, 2017, Clark and Reece entered the elevator from the parking garage to the hotel before the burglaries occurred. They exited the elevator a few minutes later and walked over to the elevator bank that accessed the hotel rooms. About 30 minutes later, they exited the elevator from the hotel and walked back to the parking

garage after the burglaries occurred. The video surveillance showed that they were together at the Hilton hotel. They drove to the Walmart retail store in a stolen car and sat in the parking lot together. They entered and reentered the Walmart retail store together on two occasions to sell Samantha's stolen cell phone to the ecoATM machine and purchase items from the self-checkout line and the jewelry section using Patrick's stolen credit cards. They held hands and shared a kiss while purchasing the item from the jewelry section. And they were apprehended together on November 13, 2017, in another stolen car that contained several of the items stolen from the hotel rooms and cars. These facts reasonably support an inference that Clark, at minimum, knowingly facilitated and encouraged the burglary by assisting another person to steal items from the hotel room, used the car keys that were stolen from the hotel room to steal additional items from Kyle's car, and sold and purchased items from the nearby Walmart using the stolen credit cards shortly thereafter.

On November 12, 2017, Clark and Reece exited the hotel elevator together and walked to the parking garage while carrying several stolen items, including the skateboard that they stole from Kyle's car the night before. A mere three minutes later, video surveillance showed Nathan's stolen car being driven out of the entrance lane of the parking garage with a key that had just been stolen from his hotel room. These facts reasonably support an inference that Clark, at minimum, knowingly facilitated and encouraged the second burglary by assisting another person to steal items from the hotel room and used the car key to steal Nathan's car.

Thus, even if the jury concluded that Clark was not the person who physically entered the hotel rooms on November 11, 2017, and November 12, 2017, it was reasonable for the properly instructed jury to conclude that he aided and abetted another person to enter the room based on the tight timeline between when he and Reece were recorded walking inside of the Hilton hotel's parking garage and main lobby, the items that were stolen from Kyle's car, and the conduct that took place at the Walmart shortly thereafter on November 11, as well as the tight timeline between when he and Reece were recorded inside of the Hilton hotel's parking garage carrying stolen items and when Nathan's car was driven out of the parking garage on November 12. On November 13, Clark also fled from the police when they attempted to apprehend him and Reece after he had committed the burglaries on consecutive days. Clark was illegally in possession of and driving the same stolen car that appeared on the Walmart surveillance video during the morning of the first burglary, and the car contained several items that were stolen from both hotel rooms and cars. These facts reasonably support an inference that Clark, at minimum, knowingly facilitated and encouraged the burglaries by helping another person steal items from both of the hotel rooms.

*C. Section 667 and Senate Bill 1393*

Senate Bill No. 1393, effective January 1, 2019, amended section 1385 to allow trial courts to strike serious felony prior convictions in the furtherance of justice. Clark's case was not yet final when the law took effect on January 1, 2019. Clark claims that the statutory change applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction,

provided the judgment of conviction is not final when Senate Bill No. 1393 becomes effective on January 1, 2019. Both parties agree that Senate Bill 1393 should be given retroactive effect under *In re Estrada* (1965) 63 Cal.2d 740. The courts which have considered the issue have held the statute must be applied retroactively in light of *In re Estrada*. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 306-308; *People v. Chavez* (2018) 22 Cal.App.5th 663, 708-712; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-974 (*Garcia*).)

We agree with the reasoning of *Garcia, supra*, 28 Cal.App.5th 961 that "Senate Bill [No.] 1393 is ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes." (*Id.* at p. 972.) Further, "under the *Estrada*[] rule . . . it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill [No.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final" when the legislation took effect. (*Id.* at p. 973.)

Clark's sentence included five years for the serious felony prior conviction under section 667, subdivision (a)(1). At the time of the original sentence the trial court lacked the power to strike the prior conviction. Thus, the court in this case was not given the opportunity to consider whether striking the prior conviction in furtherance of justice would have been appropriate. Accordingly, we remand the case to the trial court with directions to permit Clark the opportunity to request the court to strike the prior and resentence him. We express no opinion as to whether the court should grant such a request.

## DISPOSITION

The sentence is vacated, and the matter is remanded to the trial court with directions to permit Clark the opportunity to request dismissal of the serious felony prior conviction (§ 667, subd. (a)(1)) under section 1385. The court shall exercise its discretion in ruling on such request. If the request is granted, the court shall resentence Clark accordingly and forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. If the request is denied, the court shall reinstate the previous sentence. The judgment is affirmed in all other respects.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.